United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

99

No. 18766

HENRY ASHLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM C. WEITZEL, Jr.,
JOHN R. KRAMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Was the trial court clearly in error in admitting as a spontaneous declaration a statement made by complainant to her father while she was in a state of excitement bordering on hysteria induced by a sexual attack?

(2) Was it reversible error for the court to fail to give a corroboration instruction when appellant affirmatively waived objection to the court's charge as given, requested no instruction on corroboration, and conceded throughout the trial the existence of the corpus delicti to which the corroboration instruction would have been directed and when there was ample evidence in the Government's case on which the jury could have found corroboration?

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HENRY ASHLEY, APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on Februrary 17, 1964, Henry Ashley was charged with housebreaking in violation of 22 D.C.C. § 1801 and taking indecent liberties with a minor child in violation of 22 D.C.C. § 3501(a). After trial by jury, Judge Sirica presiding, on April 13, 14, and 15, 1964, he was found guilty on both counts. Judge Sirica sentenced him to imprisonment for a period of one to five years on each count, to run concurrently. This appeal followed.

The victim of the sexual attack was Jaqueline Hickerson, age ten, who lived at 1414 Corcoran Street, N.W. She testified that on Friday evening, January 24, 1964, she was sleeping in the living room of her family's apartment at the above address in the same bed as her nine-year-old sister, Alfreda, when a knock at the door awakened her (Tr. 3–7, 20–21, 29, 34, 48). She cracked the door open and saw appellant, who told her that her mother had asked him to come and stay there until she returned (Tr. 7, 22–23, 35). The complainant hesitated, but appellant put his foot in the door and forced his way in

(Tr. 8–9, 23). He pushed her into her mother's bedroom while she called out to her sister. He told the sister to go back to sleep and shut the door behind him. He turned to Jacqueline and asked her to take her pants down (Tr. 10). He was impatient when she refused because he claimed he had to go to New York, so he removed her underwear and "took his thing and told me to suck it" (Tr. 11–13). Again she refused to obey him. He pushed her on her mother's bed and started to choke her. She retaliated by biting him on the lip and was hit on her nose and mouth. Then he took his finger and stuck it in her privates (Tr. 14). She screamed and struggled, managing to fall on the floor and break loose. He ordered her back up on the bed, but she ran out of the room and out of the apartment (Tr. 15, 49–50). She kept on running until she saw Mr. "T" (Walter Thurston) (Tr. 16, 51–52). Appellant was chasing her all the while. She ran up to Mr. "T" and another lady and said she had met "that boy." Mr. "T" and others chased him out of sight around 15th Street (Tr. 16). Mr. "T" called the police. She did not tell the police anything until her father came (Tr. 33, 67).

Miss Hickerson knew appellant by sight from two prior contacts with him at her house and his house and knew him by name as "June Bug" [1] (Tr. 16–18, 44–46). She recognized the checkered coat he was wearing in court as the same coat he had on that night (Tr. 31, 47). She pointed out to the police where he lived (Tr. 62).

Both Samuel Smith and Walter Thurston, who were together on a porch when Jacqueline came running up that night with appellant on her heels, described chasing appellant into a nearby lighted alley (Tr. 66–72, 78–79, 91–94). When Smith caught up with appellant, a slight altercation ensued resulting in Smith's hitting appellant on the back of the head with a whisky bottle he found in the alley. Smith noticed that Jacqueline was crying when she ran up the steps to where he was standing (Tr. 70). To Thurston she cried out, " 'Tee, help me. This man has come into my house and he tried to kill me,' [*sic*] and he grabbed her on the legs." (Tr. 92).

Jacqueline's father, Richard Hickerson, told the court and

[1] Appellant's nickname was "Jitterbug" (Tr. 173).

the jury that he came home on the night of January 24 to confront Thurston, his daughters, and several other people in his house with the police arriving at the same time he did (Tr. 109). Jacqueline, whose mouth was swollen, was crying and breathing fast. She could hardly talk in her excited condition, but she did tell him what happened (Tr. 109, 112–113). The story he repeated was almost identical to Jacqueline's testimony on the stand.

Dr. Thomas Kazamias, who examined Jacqueline at approximately two or three o'clock on the morning of the 25th, indicated that she was apprehensive and scared (Tr. 120). She had bloodstains on her skirt and had no underwear on. Her nose had recently been bloody, her upper lip was swollen and bruised, and her hymen was torn in two places (Tr. 120–121). The hymenal injuries could have been caused by the insertion of a finger (Tr. 121).

The bulk of the remainder of the trial was consumed by defense witnesses, including appellant himself, who placed appellant in the Colt Lounge and in his home at 1514 Corcoran Street, N.W., during the period in which the assault took place and who denied that appellant had any blood or bruises on his head where Smith claimed to have hit him (Tr. 141–179, 182–199, 237–38). In rebuttal the Government called an officer and the complainant's mother, Sally Hickerson, to testify to seeing blood on the right rear of appellant's head (Tr. 214, 219, 226–227, 229), supporting Detective Paul's testimony to that effect in the Government's case in chief (Tr. 125–127, 132).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other

thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 3501(a), provides:

> Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age or sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

The trial court soundly exercised its discretion in admitting as a spontaneous declaration a statement made by a ten-year-old girl to her father while she was still so fresh from a sexual assault that she was crying and could hardly talk and while her face bore marks of a struggle so recent that opportunity for deliberation and reflection was precluded. This Court should refuse to follow appellant into the jungle of precise time sequences where the spontaneity of an utterance is clear regardless of the exact amount of time that had elapsed from the offense.

II

It was not reversible error for the trial court to neglect to give an instruction requiring the jury to find corroboration of the corpus delicti aliunde the complainant's testimony on the stand before deliberating on guilt of the entire offense, because appellant, instead of requesting such an instruction when asked by the court for additions to the charge as given despite appellant's foreknowledge that such a request would have been granted, indicated his satisfaction with the charge, because appellant never contested the existence of the corpus delicti, which it is the sole function of the corroboration instruction to assure, and because there was ample evidence in the Government's case in the form of medical testimony and the complainant's spontaneous declaration from which the jury could have found corroboration.

ARGUMENT

I. The complainant's statement to her father was properly admitted as a spontaneous declaration

(See Tr. 7–16, 66, 70, 90, 95, 109, 123.)

Appellant contends that the trial court could not have properly exercised its discretion in ruling that the complainant's statement to her father implicating appellant as her assailant was a spontaneous declaration admissible as an exception to the

hearsay rule because the trial court viewed the facts with blinders on, believing, on the basis of the complainant's father's testimony, that the statement was made within five minutes after the act, whereas police testimony, introduced after the court had ruled, would indicate that Jacqueline Hickerson did not talk to her father until approximately one hour after the disturbing event. Appellant makes a polite bow in the direction of the narrow scope of appellate review on this admissibility issue set forth in *Beausoliel* v. *United States*, 71 App. D.C. 111, 107, F. 2d 292 (1939), and reaffirmed in *Baber* v. *United States*, 116 U.S. App. D.C. 358, 324 F. 2d 390 (1963), *cert. denied*, 376 U.S. 972 (1964). At the same time, he thumbs his nose at it by requiring this Court to concoct its own time pattern from the vague time references of sundry witnesses, that is, to act as a trial court.[2]

Appellant is unable to point to any extreme circumstances in this case compelling this Court to abandon its normal adherence to the *Beausoliel* rule, *e.g.*, *Lampe* v. *United States* 97 U.S. App. D.C. 160, 229 F. 2d 43 (1956), *cert. denied*, 359 U.S. 929 (1959); *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 207 F. 2d 19 (1953), and overturn the trial court's discretionary judgment on the admissibility of an alleged spontaneous utterance as clearly erroneous as this Court did in *Brown*

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[2] Appellant's conjuring with the record affords a prime example of the unnecessary entanglements and speculative pitfalls he is luring this Court toward when he urges it to abandon the judicial highway of *Beausoliel* with its limited scope of review and play explorer by blazing a new trial through the events of the evening of January 24, 1964. Appellant is a masterful historical revisionist when he attempts to open a gap between incident and utterance of from 11:30 P.M. to approximately 12:30 A.M. or thereafter by unqualifiedly accepting Detective Paul's assertion that he arrived on the scene at exactly 12:37 A.M. (Tr. 123) and deducing that, while Mr. Hickerson was telling the truth when he claimed that the police came to his house when he himself returned (Tr. 107), he was lying when he placed his return at 11:35 P.M. (Tr. 109). The record does not make it clear that Detective Paul was the first officer to appear or that complainant was attacked at 11:30 P.M. The temporal references of Samuel Smith and Walter Thurston to 11:00 or 11:30 P.M. where all either indirect affirmances of questions that led them as to time or unconnected with complainant's appearance on the porch (Tr. 66, 90, 95). Neither Hickerson's nor Paul's specificity has any objective basis in watch-looking this record. Exact times are vague throughout. Only the relative sequence of actions is ascertainable with a high degree of clarity.

v. *United States*, 80 U.S. App. D.C. 270, 152 F. 2d 138 (1945), and *Smith* v. *United States*, 94 U.S. App. D.C. 320, 215 F. 2d 682 (1954). There is no evidence whatsoever in the record that the complainant's narrative was a completely calm one told by an uncomplaining child four or more peaceful, ordinary hours after the alleged offense, compare *Brown* v. *United States*, *supra*, or that two and a half days had passed during which the complainant had sufficient opportunity to complain before the accusation was elicited by a parent's probing, compare *Smith* v. *United States*, *supra*. What the record does reveal is an overwrought, battered, and scared ten-year-old girl whose only deliberative act before her tale gushed forth was escaping from appellant by way of the apartment door he left open in his rush to abuse her body and secure sexual satisfaction (Tr. 15). Indeed, the record indicates that she was still apprehensive and scared several hours later when she was examined by Dr. Kazamias (Tr. 120). What normal state of mind does such a young girl approach when, after she has been roused in the middle of the night, been choked, been hit on the nose and mouth, had her privates fingered, and been chased crying into the arms of neighbors (Tr. 7–16, 70), she returns home and confronts her father with a swollen mouth, crying, breathing fast, and hardly able to talk (Tr. 109)? How influenced by reflection can a child be who is fleeing such a nightmare which has branded her with visible emblems of physical and mental shock?

The facts in this case most closely resemble those in *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 211 F. 2d 19 (1953), *cert. denied*, 347 U.S. 1019 (1954), where a ten-year-old girl who had been carnally known left home within an hour of being ravished and traveled three blocks to her grandmother's house, where she arrived crying and highly distraught. This Court had no trouble finding in *Wheeler* that the circumstances of the complainant's age and condition and the time in relation to the offense provided an "ample basis" for holding her declaration spontaneous. See also *Konvalinka* v. *United States*, 162 A. 2d 778 (1960), *aff'd*, 109 U.S. App. D.C. 307, 287 F. 2d 346 (1961) (excited, running fourteen-year-old); *Jones* v. *United States*, 97 U.S. App. D.C. 291, 231 F. 2d 244 (1956)

(running, crying five-year-old); *Snowden* v. *United States*, 2 App. D.C. 89 (1893) (bruised five-year-old lying on floor within three and a half hours of offense).

Time, with which appellant wishes to replace the trial judge as the arbiter of admissibility under this exception to the hearsay rule, is an important but not a controlling factor. "Where, as in the present case, the victim is of such an age to render it improbable that her utterance was deliberate and its effect premeditated, the utterance need not be so nearly contemporaneous with the principal transaction 'as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance.'" *Beausoliel* v. *United States*, *supra* at 114, 107 F. 2d at 295. The difference between five minutes and an hour, which might, in borderline cases, have a decisive impact, is of minimal significance here where there is no proof that the complainant was other than excited, if not hysterical, or guided by reason rather than under the domination of purely sensory responses to fear and pain at the instant she told her father the story of her night. By monomaniacally focusing on the time element, appellant puts on the very blinders he wants this Court to strip from the eyes of the trial court. He fails to see the plain facts revealing the complainant's state of mind when she first spoke to her father at whatever interval from the offense this occurred. Appellant should consider the beam in his own eye before denouncing the mote in the trial court's.[2]

II. The court's failure to give a corroboration instruction was not reversible error

(See Tr. 120–121, 138–141, 141–177, 182–197, 237–239, 244, 248–249, 259, 262–263.)

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[2] Even if this Court should conclude that there was an abuse of discretion in admitting this testimony, the error would be harmless under the circumstances of this case, since Mr. Hickerson's testimony was merely cumulative *vis-à-vis* what the complainant had already said on the stand subject to full cross-examination and had explained in response to questioning by appellant that she had repeated to the police that same night (Tr. 26). See *Baber* v. *United States*, *supra*. See also *Harris* v. *United States*, 50 App. D.C. 139, 269 Fed. 481 (1920).

Appellant now complains about the trial court's failure to instruct the jury on the need for corroboration of the testimony of the complaining witness in a Miller Act case alleging indecent liberties in order to establish the corpus delicti. Where was appellant when the trial court directly asked him, at least twice (Tr. 259, 262–263), whether he had any objections to the charge as given or any further instructions to request? He was right there, disclaiming any protest, expressing complete satisfaction with the court's charge (Tr. 259, 263). Now, on appeal—some 223 days after the alleged damage could easily have been undone had appellant so desired at that time—appellant changes his mind and cries "error." This is precisely the sort of metamorphic maneuver undermining the orderly administration of justice that Rule 30, F.R. Crim. P., was designed to prevent. See, *e.g.*, *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F. 2d 544, *cert. denied*, 361 U.S. 865 (1959); *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F. 2d 216 (1958), *cert. denied*, 359 U.S. 959 (1959); *Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F. 2d 703 (1951), *cert. denied*, 342 U.S. 943 (1952); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950).

It is no answer to say that the trial court itself was aware that a corroboration instruction would be advisable. Indeed, appellant's nonfeasance is even more culpable since he knew that the court wanted to be reminded if it neglected to incorporate such an instruction into its charge. Rule 30 does not contemplate transferring the burden of making appellant's record on appeal to the trial court or of assigning error in behalf of appellant to the Government. The burden remains where Rule 30 dropped it, squarely on the shoulders of the party claiming error. If appellant failed to sustain it, he must suffer the consequence of foreclosure of appellate review.

Appellant is precluded from challenging the absence of any charge on corroboration not only because of his noncompliance with Rule 30 but also because he relied exclusively upon the defense of alibi, conceding the existence of a sexual attack and raising as the crucial issue only the identification of him as the attacker. Cf. *Wright* v. *United States*, 116 U.S. App. D.C. 60, 320 F. 2d 782 (1963). Compare *Roberts* v. *United States*, 109

U.S. App. D.C. 75, 284 F. 2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961). As it has evolved in the line of cases culminating in *Wilson* v. *United States*, 106 U.S. App. D.C. 226, 271 F. 2d 492 (1959), the corroboration rule in the context of sexual offenses in which the accuser is a child, *i.e.*, Miller Act cases, is that the courts should not allow the case to go to the jury unless the Government has carried its burden of proving the corpus delicti by adducing some unspecified quantum of evidence in addition to the testimony of the complainant. The corpus delicti of this crime comprehends only the fact of criminal injury caused by someone. *Jones* v. *United States, supra*. It does not include proof of the guilty agent responsible for the occurrence of the wrong, *i.e.*, the identity of accused as the criminal. There need not, therefore, be any corroboration of the accused's connection with the crime. Proof *aliunde* the complaining witness' in-court testimony that the attack took place is sufficient to satisfy the Government's special burden of producing evidence under *Wilson*.

Appellant nowhere contended that the whole incident was a figment of Jacqueline Hickerson's imagination. His entire opening statement was directed to outlining his forthcoming showing of mistaken identity (Tr. 138–141). That was the defense he exclusively relied on. He called witnesses whose only testimony was that he was elsewhere with them when the alleged indecent acts were performed and that he sustained no head injuries that would tie him in with the man Samuel Smith allegedly hit with a whisky bottle (Tr. 141–177, 182–197, 237–239). In his cross-examination of the complainant he refrained from undermining her version of what was done to her body and concentrated totally on destroying the foundation of her positive identification of him as her assailant with accent on her ability to observe and remember (*e.g.*, the location of lights in her home and the color and type of her attacker's clothing). He frankly admitted to the court that his defense was alibi (Tr. 223), and the court quite properly clarified the jury's deliberations by placing appellant's case in this framework (Tr. 248–249). Appellant cannot now claim that his conviction should be overturned because the jury was not shown how to proceed to disinter the corpus delicti which appellant

long since had acknowledged had been laid out under their very noses.

Appellant's sole remaining escape hatch is reliance on plain error, Rule 52(b), F.R. Crim. P. Even that is firmly sealed off here by an abundance of corroborative evidence in the Government's case and the inclusion of Lord Hale's 1680 epigram on rape (a charge easily made, hard to defend against) in the charge as an instruction of law (Tr. 249). See *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F. 2d 205 (1964). In *Wilson* v. *United States, supra; Fountain* v. *United States*, 98 U.S. App. D.C. 389, 236 F. 2d 684 (1956); *Jones* v. *United States, supra;* and *Brown* v. *United States, supra*, no doctor could provide evidence reflecting physical injury to the sexual organs or marks on other parts of the body indicative of assault. Here Dr. Kazamias testified that when he examined complainant between 2:00 and 3:00 A.M. on the morning of January 25, 1964, she had blood stains on her skirt, a recently dried bloody nose, a swollen bruised upper lip, and, most significant of all, two tears in the hymen which could have been caused by the insertion of a finger (Tr. 120–121). This catalogue of trauma more than supplies the amount of corroboration this Court was looking for in *Wilson, Fountain, et al.* In addition, there is corroboration in the identical form approved in *Konvalinka* v. *United States, supra*—the complainant's spontaneous declaration.

In the face of such weighty corroboration of the sexual attack upon complainant, the special instruction on the nature of this case, and appellant's consistent refusal to litigate the existence of the corpus delicti, there was no prejudice to appellant warranting reversal in the trial court's allowing the case to go to the jury without a corroboration instruction. See *Franklin* v. *United States, supra.* See also *George* v. *United States*, 75 U.S. App. D.C. 197, 125 F. 2d 559 (1942). Compare *Pinkard* v. *United States*, 99 U.S. App. D.C. 394, 240 F. 2d 632 (1957) (plain error despite no objection where double hearsay in large quantities was admitted in a case in which the circumstantial evidence of guilt was not altogether clear).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,766

HENRY ASHLEY,
Appellant,

V.

UNITED STATES OF AMERICA,
Appellee

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court clearly erred in admitting into evidence under the spontaneous declaration exception to the hearsay rule utterances in fact made about one hour after the incident but mistakenly believed by the trial court to have been made within five to ten minutes after the alleged attack.

2. Whether the trial court erred in failing to instruct the jury that the corpus delicti of an alleged sex offense to a minor child could not be established by the complaining witness' uncorroborated testimony.

STATEMENT OF POINTS

Point I

The trial court erred in admitting into evidence the testimony of Mr. Richard Hickerson relating to statements made to him by the complaining witness after the incident.

Point II

The trial court erred in failing to instruct the jury to the effect that the corpus delicti in the alleged sex crime could not be established by the 10 year old complaining witness' "uncorroborated testimony".

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted in a two count indictment filed February 17, 1964. Count 1 of the indictment charged Appellant with a violation of Title 22 of the District of Columbia Code, Section 1801, housebreaking; Count 2 charged a violation of Title 22 of the District of Columbia Code, Section 3501(a), taking indecent liberties with a minor child. On April 13-15, 1964 he was tried by the United States District Court for the District of Columbia before the Honorable John J. Sirica, District Judge, and a jury. A verdict of guilty as indicted on Counts 1 and 2 was entered on April 15, 1964. Appellant was sentenced to imprisonment for a period of one to five years on Count 1 and one to five years on Count 2; the sentence imposed on Count 2 to run concurrently with the sentence imposed on Count 1. Notice of appeal was filed June 30, 1964. The jurisdiction of this court is founded upon 28 U.S.C. 1291.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A hereto.

SUMMARY OF ARGUMENT

The trial court permitted the testimony of the complaining witness to be corroborated by hearsay testimony as to her utterances made after the incident. Over Appellant's objection the testimony was admitted under the mistaken belief that the declarations had been made within five to ten minutes after the incident. The trial record as a whole establishes that the utterances came at least one hour after the incident and while the complaining witness was being interrogated by police. Thus the trial court's application of the spontaneous declaration exception to the rule against hearsay testimony was clearly erroneous.

Further, the trial court erroneously failed to instruct the jury concerning the need for corroboration of the complaining witness' allegation of indecent liberties. The instruction was omitted despite the agreement of the court and trial counsel that it should be included in the charge to the jury. Its omission was plain error affecting substantial rights.

STATEMENT OF THE CASE

The complaining witness is Jacqueline Hickerson, age 10. On Friday night, January 24, 1964 Jacqueline and her 9 year old sister, Alfreda, were asleep fully clothed in the combination living room-bedroom of their home at 1414 Corcoran Street, N. W. The children were alone, the mother having left about 10:30 p.m. and the father having gone out about 11:00 p.m.[1/]

The complaining witness testified in substance as follows: She was awakened at 11:30 p.m. by a knock at the door. The room was fully lighted. She went to and cracked the door open. A person, later identified by Jacqueline as the Appellant, told her through the cracked door that her mother had asked him to baby-sit until she returned. Jacqueline refused to open the door. Thereupon her assailant forced his way into the living room and pushed her into the mother's fully lighted adjoining bedroom.

The assailant closed the door between the living room and the mother's bedroom. He asked Jacqueline to undress but she "kept on messing with the buttons" to what were apparently snow pants but "couldn't get them down". Alfreda awakened and entered the room. The assailant told Alfreda to go back to sleep. She left the room and the assailant closed the door between the rooms.

1/ The time of the father's return is in critical conflict. At about midnight the mother is evidenced attending a party in the rooming house in which Appellant rented a room.

Jacqueline testified that the assailant then "took my pants down and my underwear"; that he exposed himself and that he told Jacqueline to perform an act of oral sodomy. Jacqueline refused whereupon the assailant forced her to the bed and choked her. When she bit him on the lip he struck her on the nose and mouth. Jacqueline then testified that "later on" he penetrated her body with his finger. She screamed and fell to the floor. Thereafter Jacqueline "saw the door was open, the door to my mother's room was open, so I ran, and I ran."

The child ran from 1414 to either 1436 or 1452 Corcoran.[2/] She there encountered an old friend, Mr. Walter M. Thurston, and a group of other adults, including Mr. Samuel A. Smith. Jacqueline testified that she immediately told Mr. Thurston to "go get my mother." Mr. Thurston testified that Jacqueline's first words were: "Tee help me. This man has come into my house and he tried to kill me and he grabbed her on the legs." Witness Smith testified that the child was crying and said "the boy has broken into her house."

Jacqueline's assailant had been "trotting" behind her. When she stopped to talk to Mr. Thurston the assailant passed the group. Mr. Smith said "let's get him." The evidence shows that the assailant then commenced to run; that he was pursued approximately one block; that he was apprehended in an alley by Mr. Smith and Mr. Thurston; and that when he "went into his pocket" Mr. Smith struck him on the head with a whiskey bottle. In the altercation Mr. Smith's finger was cut and the assailant escaped. The encounter in the alley lasted about three minutes.

2/ Witness Smith testified that Jacqueline ran to 1452. Mr. Thurston testified that the child spoke to him as he was leaving the premises at 1436.

According to Jacqueline's testimony, thereafter Mr. Thurston and others in the group took her back to the Hickerson home where Mr. Thurston called the police. She testified that she did not tell anyone, including the police of the attack "until her father came." Jacqueline stated that her sister Alfreda, an eye witness, had "told my mother" that "she saw the man." Alfreda was not called as a prosecution witness. In response to an inquiry by the Court, Jacqueline testified that she had not "talked to her father" about the case.

Officer John B. Paul, a plainsclothesman assigned to the sex squad of the Metropolitan Police Department, testified that the police arrived at the Hickerson home "at approximately 12:37 a.m." or about one hour after the incident. The police remained there about 20 minutes, during which time Detective Paul talked with Jacqueline. The officers then drove Jacqueline and her father to the Women's Bureau of the Metropolitan Police Department. During that trip the police stopped briefly at Appellant's residence and inquired as to the whereabouts of a boy called "June Bug". They were told by the landlady that no one by that name resided in her house. The subsequent testimony of Mrs. Hickerson and the landlady places the first visit by Officer Paul well after midnight (Tr. 190-191, 224-225). Jacqueline thereafter made a statement at the Women's Bureau and about 2:00 or 3:00 a.m. on January 25th was examined by an intern at D. C. General Hospital.

Jacqueline's testimony concerning the indecent liberties taken by her assailant was corroborated by the testimony of her father as to what Jacqueline had told him after the incident. Mr. Hickerson stated that he had left the children alone in his residence at about 11:05 p.m.

on January 24, 1964. He then testified as follows (Tr. 109):

"Q. When did you next return to your home?

A. I came back about 11:35.

Q. Was anybody in your house at that time when you returned?

A. It was a lady, a man, two men, and Mr. Thurston, and I don't know the other gentleman, and my daughters.

Q. Was any policemen there?

A. They came in at the same time I did. (Emphasis supplied).

Q. Now, what was Jacqueline's physical condition when you saw her?

A. Her mouth was swelled up, she was crying, and she was breathing fast, and she could not hardly talk.

Q. Did she appear calm or excited, or how would you describe her emotional condition?

A. She was excited.

Q. Did she say anything to you?"

Whereupon Appellant's counsel objected, invoking the rule against the admission into evidence of hearsay testimony. Solely in reliance upon belief that the father was about to evidence statements made by Jacqueline within "five to ten minutes" after the incident, the trial court permitted him to relate Jacqueline's utterances. However, the trial court very carefully prohibited the father from relating statements made by Jacqueline approximately 20 minutes later.

The medical examination of Jacqueline by an intern at D. C. General Hospital revealed that there were blood stains on her skirt; that she was not wearing underwear; that there was evidence of a nose bleed

from the right nostril; that the upper lip was a little swollen and bruised; and that the hymen was torn in two places. The intern further testified that in his opinion the injury which he observed to the hymen could have been caused by the insertion of a finger. However there is no testimony whatsoever that the torn hymen was of recent origin or that it was in any way connected with the alleged assault.

Appellant was arrested in his room at approximately 2:00 a.m. on January 25, 1964. He steadfastly denies that he is the assailant.

ARGUMENT

Point I

As his first point, Appellant submits that the trial court erred in admitting into evidence the testimony of Mr. Richard Hickerson relating to statements made to him by the complaining witness after the incident. With respect to Point I, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 5-16, 20, 25-28, 33-34, 36, 51, 53, 60, 66-70, 90-92, 95, 102, 107-116, 120-125, 154-155, 186-190, 220, 224, 227-228.

Appellant has been convicted of taking indecent liberties with a minor child. This is a repellant charge but, as this Court put it in 1956, such a charge "does not destroy the presumption of innocence or justify a conviction on evidence which is not sufficient to prove beyond a reasonable doubt every element of the alleged offense (here the corpus delicti)." Jones v. United States, 97 U.S. App. D.C. 291, 231 F. 2d 244 (1956). Here the alleged sexual offense stems from the accusation of a

child 10 years of age. This case thus lies in a field in which this Court has traditionally been unusually skeptical toward the accusation. Fountain v. United States, 98 U.S. App. D.C. 389, 236 F. 2d 684 (1956); Jones v. United States, supra; Kelly v. United States, 90 U.S. App. D.C. 125, 194 F. 2d 150 (1952).

The traditional skepticism of courts toward the present sort of accusation has resulted in this Court's adoption of the rule that the corpus delicti in an indecent liberties case ". . . may not be established by the child's uncorroborated testimony on the witness stand." Wilson v. United States, 106 U.S. App. D.C. 226, 271 F. 2d 492 at 493 (1959). Moreover, the same uncertainty forms the basis for the rule in this jurisdiction that in an indecent liberties case involving minor children the spontaneous utterances of the alleged victim may not, standing alone as the only evidence, show the corpus delicti of the crime charged. Fountain v. United States, supra; Brown v. United States, 80 U.S. App. D.C. 270, 152 F. 2d 138 (1945). Thus neither the spontaneous exclamation of a child alone nor the uncorroborated testimony of a child by itself can establish the corpus delicti of an alleged sexual crime against the child.

In this case the prosecution was obviously well aware of the foregoing principles. It first produced the testimony of the complaining witness. It then attempted to corroborate the child's independent testimony by the testimony of her father as to statements made to him by Jacqueline under what was alleged to be a lapse of from five to ten minutes between the happening of the indecency and the child's utterance.

But the trial record as a whole establishes that the child's statements to her father came at least one hour after the incident and in the presence of the police. Mr. Hickerson was obviously mistaken when he testified that he returned home about 11:35 p.m. on January 24th. He also testified that he and the police arrived at the same time and that the police were present when Jacqueline related her experience (Tr. 109, 112). The testimony of Detective Paul shows that the police first arrived on the scene at approximately 12:37 a.m. on the early morning of January 25, 1964 or approximately one hour after the incident. The Detective testified that when the police arrived at the Hickerson residence there was present at the house the complaining witness, her father, her sister Alfreda, a small child, Mr. Thurston, and Mr. and Mrs. Carter. Since Mr. Hickerson stated that his return home coincided with the arrival of the police he could not have talked to the complaining witness five to ten minutes after the incident.

The sequence of events when viewed in perspective make it clear that Mr. Hickerson erroneously testified respecting the time element. The complaining witness was awakened by the assailant at approximately 11:30 p.m. Thereafter the alleged indecencies were committed. The child escaped and ran about one block. Witnesses place her escape at about 11:30 p.m. The assailant was chased for over a block and apprehended in an alley. The pursuers and the pursued remained in the alley for about 3 minutes. Mr. Thurston returned to Corcoran Street and together with the complaining witness and others proceeded to the Hickerson home and called the police. The police arrived at 12:37 a.m., stayed for about 20 minutes and then proceeded to Appellant's residence one block away.

Mrs. Sally Hickerson, Jacqueline's mother, testified that she arrived at Appellant's residence about midnight and that thereafter she was present when the police unsuccessfully first inquired as to the presence of "June Bug". That inquiry must have taken place about 1:00 a.m. Jacqueline was then taken to the Women's Bureau and about 2:00 or 3:00 a.m. was examined at D. C. General Hospital. Such a sequence of events precludes the possibility of Jacqueline having talked with her father five or ten minutes after the incident.

Had the trial court been aware of the elapse of one hour between the event and the utterance it would obviously not have permitted the assailed testimony. The trial court would not permit Mr. Hickerson to testify as to hearsay statements made to him by Jacqueline 20 minutes after her supposed spontaneous description of the incident. The trial court was conscientiously attempting to apply the standards of Beausoliel v. United States, 71 App. D.C. 111, 107 F. 2d 292 (1939). Under that case the trial court when faced with an alleged spontaneous utterance must carefully weigh all of the facts and circumstances surrounding the making of the statement. The lapse of time between the incident and the utterance together with testimony as to the mental and emotional condition of the complaining witness must be weighed. Cf 83 ALR 2d 1378n. Whether or not the circumstances surrounding the utterance of a statement such as to render hearsay testimony relating its content admissible within the spontaneous declaration exception is a question that is ordinarily one for the exercise of sound judicial discretion which will not be disturbed on an appeal unless clearly erroneous. Beausoliel v. United States, supra. In the circumstances here shown the trial court

could not have properly exercised its discretion because at the time the assailed testimony was offered and admitted over objection it had been misinformed as to the time interval elapsing between the incident and the utterance. The action of the trial court is therefore clearly erroneous.

The assailed testimony must be considered in light of other spontaneous declarations of the complaining witness admitted into evidence without complaint. Jacqueline testified that while being pursued by her assailant she saw Mr. Thurston and "I told Mr. Tee to go get my mother." Both Mr. Thurston and Mr. Smith related Jacqueline's first statements as dealing with non-sexual events. Her utterances under the stress of the chase do not allege the commission of any element of the sex crime for which the Appellant stands convicted. But in logic this Court would expect Jacqueline's emotional state upon seeing Mr. Thurston to have induced spontaneous utterances tending to prove the corpus delicti of the sex crime. Certainly one would expect such utterances to come forward spontaneously at that time rather than approximately one hour later. In the recent case of Barber v. United States, 324 F. 2d 390 (1963), this Court had occasion to label as "borderline" the admission of a spontaneous declaration made 25 minutes after the exciting event and "scanty evidence" as to the declarant's mental and emotional condition during the crucial interval. In Konvalinka v. United States, 162 A. 2d 778 (1960), affirmed 109 U.S. App. D.C. 307, 287 F. 2d 346 (1961), the Municipal Court of Appeals for the District of Columbia affirmed a conviction for a homosexual assault only because there was "no doubt"

concerning the admissibility of hearsay statements under the spontaneous utterance exception. There the spontaneous declaration introduced to corroborate the testimony of the complaining witness had been made to a police officer "probably about 5 minutes" after the incident. Here the utterance had come over an hour later and was admitted under the erroneous assumption that only five minutes had elapsed.

This Court on appeal should reverse a criminal conviction when the admission of the damaging testimony by the trial court was clearly erroneous. Moreover, the admission of the assailed testimony standing alone is enough to require reversal. But for this error there is no indication what the jury would have found with respect to the claimed defense.

Point II

As his second point, Appellant submits that the trial court erred in failing to instruct the jury to the effect that the corpus delicti in the alleged sex crime could not be established by the 10 year old complaining witness' "uncorroborated testimony". With respect to PointII Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 243-244, 245-264.

The requirement for a jury instruction in this case concerning corroboration is fully set forth in Appellant's argument on Point I. During the course of the bench conference between the Court and trial counsel concerning the Court's charge to the jury, the Assistant United States Attorney suggested to the Court and the Court agreed that the jury should be instructed that corroboration is necessary in a sexual offense.

However the Court's charge to the jury fails to contain such an instruction. In light of the unanimous agreement of trial counsel and the Court that such an instruction should be given the Government cannot now be heard to say that the failure of the trial court to give it should have been the subject of an exception by defense counsel. In fact, in the colloquy between the Court and trial counsel the Court specifically requested the Assistant United States Attorney to remind it of the instruction "if I overlook it". Thus the burden of noting the error was upon the prosecution. In such circumstances, this Court should reverse and remand for a new trial under the principle that plain error affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Rule 52 B, Federal Rules of Criminal Procedure, 18 U.S.C.A.; Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F. 2d 632 (1957).

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

DISTRICT OF COLUMBIA CODE
(1961 Edition)

Chapter 18.--HOUSEBREAKING

§22-1801. Definition and penalty.

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Chapter 35--SEXUAL PSYCHOPATHS

§22-3501. Indecent acts--Children.

(a) Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years.

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,766

HENRY ASHLEY,

Appellant,

V.

UNITED STATES OF AMERICA,

Appellee

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

HENRY ASHLEY Appellant V. UNITED STATES OF AMERICA Appellee	)	No. 18,766

REPLY BRIEF FOR APPELLANT

Appellant files this reply to the brief for Appellee.

SPONTANEOUS DECLARATION -
THE CRUCIAL TIME ELEMENT

Appellant has previously demonstrated the passage of approximately one hour between the alleged attack and the child's statement to her father. Appellee does not directly controvert Appellant's statement of the facts. Rather, it says the father's testimony is admissable apart from the time element because "there is no proof that the complainant was other than excited, if not hysterical, or guided by reason rather than under the domination of purely sensory responses to fear and pain at the instant she told her father the story of her night" (Brief, p. 8).

Appellee's position ignores the trial court's reliance upon an erroneous time element as the dominant reason for admitting the father's testimony. The following bench conference took place upon Appellant's objection to the intended hearsay testimony (Tr. 110-112):

"MR. MILLER: I object to this, Your Honor.

THE COURT: Just a minute.

This is 11:35 o'clock; is that correct?

MR. WEITZEL: Yes, Your Honor.

THE COURT: Well, now, what about the admissability of this evidence?

MR. WEITZEL: May we approach the Bench, Your Honor?

(Thereupon, counsel approached the Bench, and the following occurred).

THE COURT: You are offering this as res gestae?

MR. WEITZEL: Your Honor, as a spontaneous declaration.

THE COURT: How long after the alleged act did it occur?

MR. WEITZEL: Mr. Thurston and Mr. Smith testified that the little girl ran down the street at 11:30, in front of them, and this would be within five or ten minutes.

THE COURT: He said that this was 11:35.

MR. WEITZEL: And he also said she was excited, and emotionally upset, and you have a condition, a basis for this.

THE COURT: I just want to be careful. I wanted to know your theory.

MR. MILLER: Your Honor, I would object to this for the reason that it has nothing to do with the act that preceeded running down the street. We are concerned whether there was a breaking and entering and an attack on the child.

THE COURT: What is he going to testify about?

MR. WEITZEL: That she told him what happened.

THE COURT: You are going to have him detail what she told him?

MR. WEITZEL: Yes, sir.

THE COURT: If this occurred within five minutes after the act, or that these two witnesses testified that they saw her running down the street, being chased by a man, I think it is testimony, in view of her tender years, and that she is only ten years old, that this should be received as part of the res gestae.

I suppose what you are trying to prove is that it is without time to reflect or think about the matter?

MR. WEITZEL: Yes, sir.

THE COURT: Do you have any case on it?

MR. WEITZEL: Yes, I have a Wheeler case, 93 US. Appeals, 163.

THE COURT: How much time elapsed?

MR. WEITZEL: It was only, I think, ten minutes after the offense.

MR. MILLER: This doesn't make it res gestae. There is testimony as to what took place, and if this witness testifies about the same thing, to corroborate it, by what somebody told him, that is rehabilitating the government case, and it does not add anything to what has previously been testified.

THE COURT: Well, it may be evidence that may tend to corroborate her, and the fact that she explained it shortly after the act.

MR. MILLER: But this is not a rape case.

THE COURT: But it is a sex case. It is the same type of offense. Maybe he didn't have intercourse with her, I don't know, but I will admit it over objection."

Consistent with its prior concern as to the time element, the trial court later refused to permit the father to relate statements made to him by the child approximately 20 minutes after the alleged spontaneous declaration (Tr. 114). Thus in exercising its discretion the trial court viewed the elapsed time between incident and utterance as the controlling factor on admissability. The trial court, not Appellant, concentrated interest on the time element. This court therefcre should not follow Appellee down the path of "the complainant's state of mind when she first spoke to her father at whatever interval from the offense this occurred" (Brief, p. 8). The path of the mind is built on a foundation of time.

During the Bench conference and on brief to this court Appellee relies upon Wheeler v. United States, 93 U.S. App. D.C., 211 F. 2d 19. There a ten year old child's utterance was related to the jury by the child's grandparent when it appeared that the child had immediately left the place of the alleged attack; had walked directly to her grandmother's home three blocks away; had arrived in a highly distraught and shocked condition; and had made the utterance immediately upon arrival to the first person encountered. Under such circumstances this court viewed the utterance as having been made under the "immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned

reflection." The facts and circumstances of the Wheeler Case are inopposite. Here, an hour intervened between incident and utterance. During that period the child was comforted and administered to by at least three adults and her infant sister. Two of the adults testified in the court below. Neither attributed to the child any utterance which even remotely tended to corroborate the alleged indecent liberties. To the contrary, the character of the child's statements to Messrs. Thurston and Smith had nothing whatsoever to do with the corpus delicti of the crime for which Appellant stands convicted. The only eye witness to the alleged crime was not called as a witness. Even the father's testimony does not fully corroborate the child's testimony. His hearsay testimony omits any reference to the alleged penetration of the child's body by the assailant (Tr. 113). Surely had there been actual spontaneity penetration rather than exposure would have been paramount in the child's mind. In the Konvalinka Case,[1/] also relied upon by Appellee, the assualted fourteen year old related the entire story within five minutes after the incident to the first person encountered. In Jones v. U.S., 97 U.S. App. D.C. 291, 231 F. 2d 244, also relied upon by Appellee, the aggrieved five year old related the entire story to her mother immediately after the incident. However, in Jones the hearsay was held insufficient to support the guilty verdict because the child was incompetent to testify and the examining physician was unable to find any evidence of the corpus delicti.

Here, as in Jones, the testimony of the examining intern does not independently corroborate the complainant's allegations concerning the

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1/ Konvalinka v. U.S., 162 A. 2d 778 (1960), aff'd. 109 U.S. App. D.C. 307, 287 F. 2d 346 (1961).

commission of an indecent liberty. The apprehension and fright attributed to the child by the intern is consistent with a child's normal fear of doctors. The intern's testimony is void of any connection between the incomplete hymen and the alleged attack. The doctor's description of the child is as consistent with the appearance of a child beaten by a parent as with a sexually violated ten year old. In any event, the intern's testimony does not and cannot correct the error in admitting the hearsay testimony of the father.

THE OMITTED CORROBORATION INSTRUCTION WAS ESSENTIAL

Appellee and Appellant are in accord that in this jurisdiction neither the spontaneous exclamation of a child alone nor the uncorroborated testimony of a child by itself can establish the corpus delicti of an alleged sexual crime. The trial court was of a like view. Moreover, the trial court and the parties were in agreement that the jury should have been instructed to the effect that "corroboration is necessary in a sexual offense" (Tr. 244). However, the trial court omitted any such instruction despite its admonition to Appellee "If I overlook it, please remind me" (Tr. 244).

Appellee argues that the omission of the instruction is not reversible error because (1) Appellant had not rested his defense on lack of proof of the corpus delicti, and (2) Appellant had not preserved the point in the trial court. Neither reason is sufficient in the context of this case.

It was the burden of Appellee to prove beyond a reasonable doubt that the specific offense charged had actually been committed. In other

words the burden of proving the corpus delicti was upon the government. Jones v. United States, 97 U.S. App. D.C. 291, 231 F. 2d 244. It was thus not essential to Appellant's case that he disprove the commission of the offense. Appellant timely objected to admission of the father's testimony tending to corroborate the child's testimony. He timely objected to the intended corroborating testimony of the examining intern on the grounds that he "has not properly qualified as a doctor" (Tr. 119). As seen, the trial court erroneously permitted the former and the latter failed in its intended purpose. At that point in the trial it was not incumbent upon Appellant to affirmatively show the non-commission of an indecent act. Indeed, to attempt to do so would have been folly. The government simply had not proved its case. All that remained was the necessity of bringing the point home to the jury.

Appellee says that Rule 30, Fed. R. Crim. P. condems Appellant to imprisonment for a period of one to five years. The cases cited by Appellee on the point, however, involve situations in which the trial court had not been advised of its proper course. Here, not only had it been advised by the government but, more importantly, had agreed to give the necessary instruction. The inadvertent omission is precisely the kind of plain error or defect which should be noticed and corrected by this court under Rule 52(b) Fed. R. Crim. Proc.

The plain error of omission goes to the heart of the case and clearly affects substantial rights. The child's testimony standing alone was not sufficient to support the guilty verdict. The "catalogue of trauma" summarized in Appellee's brief does not establish the sexual transgressions for which Appellant was convicted. On the other side of

the coin the jury had evidence to the effect that the room was fully lighted; that an eye witness was not called to testify; that a door supposedly closed by the assailant was open when the child escaped; that the child's first words omitted reference to sexual matters, and that the mother was "partying" in Appellant's rooming house. In the context of the record as a whole it was absolutely essential the jury know that the child's testimony concerning indecent liberties must, as a matter of law, be corroborated. The lack of such an instruction is reversible error which should be corrected by this court under Rule 52(b) Fed. R. Crim. P.

Respectfully submitted,

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January 4, 1965